IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL EUGENE VICK, Appellant.	No. 39424-3-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Michael E. Vick guilty of failing to register as a sex offender. Vick appeals his conviction, asserting that (1) there is insufficient evidence to convict him of failure to register as a sex offender, (2) the sex offender registration statute violates his due process rights because the term "normal business hours" is vague, and (3) the trial court abused its discretion when it failed to consider an exceptional sentence below the standard range. Because sufficient evidence supports Vick's conviction and Vick testified he understood he was required to report between 8 am and 5 pm on September 16, 2008, we affirm his conviction. And because the trial court did not err when it denied Vick's motion for an exceptional sentence below the standard range, we affirm his 14-month incarceration and 36-month community custody sentence.

FACTS

On October 31, 2008, the State charged Vick with failure to register as a sex offender contrary to former RCW 9A.44.130 (2006). A jury trial began on April 20, 2009. At trial, Lewis County Sheriff Detective Brad Borden testified that on September 16, 2008, Vick failed to appear in person to register as a sex offender as required under former RCW 9A.44.130. Borden further testified that he did not receive a voicemail message from Vick until 7:50 am the following morning on September 17, 2008. Borden returned the phone call and arranged for Vick to meet with him as soon as possible; Vick arrived at the sheriff's office less than one hour later.

Vick testified that he left his home in Centralia, Washington at approximately 4 pm. While still very close to his home, Vick noticed that the front passenger side tire of his truck was flat. Vick testified that he walked to a nearby market where he called his landlord and manager for help.[1] Vick further testified that he did not attempt to call Detective Borden because he had not memorized the telephone number and only had enough money for a single phone call. Last, Vick testified that he arrived at the sheriff's office at approximately 5:15 pm but was told that the sheriff had "gone home" and to "call first thing in the morning." Report of Proceedings (RP) (Apr. 20, 2009) at 39.

The jury found Vick guilty of failing to register as a sex offender. After denying Vick's motion for imposition of an exceptional sentence below the standard range, the trial court sentenced him to 14 months incarceration, the low end of the sentencing range, followed by 36 months of community custody. Vick timely appeals his conviction.

DISCUSSION

[1] There is conflicting testimony on this point. The landlord-manager testified that Vick was still at home when he called for help with the flat tire.

Sufficiency of Evidence

Vick asserts that the evidence presented at trial is insufficient to support his conviction for failure to register as a sex offender. Specifically, Vick argues that his arrival at the sheriff's office approximately 15 minutes late did not constitute a failure to appear in person within "normal business hours." Alternatively, Vick argues that even if his tardiness left him outside the bounds of "normal business hours," the State failed to prove that Vick acted "knowingly" when he arrived late. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

In order to prove failure to register as a sex offender, the State must show that Vick knowingly failed to comply with the requirement that he register in person with the sheriff. Former RCW 9A.44.130(7). The sex offender registration statute provides, "All offenders who are required to register . . . must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office,

and shall occur during normal business hours." Former RCW 9A.44.130(7). Former RCW 9A.44.130(11)(a) then provides, "A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony." A person acts "knowingly" when either he is aware of facts described by a statute defining an offense or when "he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense." Former RCW 9A.08.010(1)(b)(ii) (1975).

The evidence against Vick is sufficient to support the jury's verdict finding him guilty of failing to register as a sex offender. Here, Vick testified that he was given written notice at a previous registration meeting on June 30, 2008, which stated he was required to report on September 16, 2008, between 8 am and 5 pm. Vick further testified that he was aware it was a crime to fail to register every 90 days as required under former RCW 9A.44.130(7). On September 16, 2008, Vick had the opportunity but did not contact Detective Borden before 5 pm to let Borden know he had a flat tire and was running late. Vick did not call Borden until the following morning to explain his failure to register in person. Accordingly, the evidence is sufficient to show that Vick knew the date and times during which he was required to register in person, that he was going to be late, and that he did not arrive to register within the time required.

Vick appears to argue that his substantial compliance with the reporting requirements imposed on him by former RCW 9A.44.130(7) is sufficient to satisfy his statutory obligation to register as a sex offender. But substantial compliance is not a defense to a charge of failure to register as a sex offender. *State v. Vanderpool*, 99 Wn. App. 709, 711-12, 995 P.2d 104, *review denied*, 141 Wn.2d 1017 (2000); *State v. Prestegard*, 108 Wn. App. 14, 21-22, 28 P.3d 817 (2001). The State argues that the policy of former RCW 9A.44.130 is to allow law enforcement

agencies to protect their communities, conduct investigations and quickly apprehend sex offenders. *Vanderpool*, 99 Wn. App. at 712 (citing former RCW 9A.44.130 (1990) (Finding—Policy—1990 c 3 § 402)). And that without strict compliance with the registration requirements, this policy is undermined. Furthermore, the State contends that allowing substantial compliance as a defense would conflict with the well-established rule that "'a good faith belief that a certain activity does not violate the law is . . . not a defense in a criminal prosecution.'" *Vanderpool*, 99 Wn. App. at 712 (quoting *State v. Reed*, 84 Wn. App. 379, 384, 928 P.2d 469 (1997)). Accordingly, we agree that substantial compliance is not a defense to a failure to timely register.

Due Process and Vagueness

For the first time on appeal, Vick asserts that former RCW 9A.44.130(7) violates his constitutional due process rights because the term "regular business hours" is statutorily undefined and vague. Because Vick argues that the statute is ambiguous, he also asserts that this court must apply the rule of lenity in his favor when interpreting the statute. We disagree.

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The appellant must show actual prejudice in order to establish that the error is "manifest." *State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), *review denied*, 145 Wn.2d 1023 (2002). "A statute is void for vagueness if it is framed in terms so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

There is no distinction between the vagueness tests applicable to civil and criminal proceedings. *Mays v. State*, 116 Wn. App 864, 869, 68 P.3d 1114 (2003). A statute is presumed to be constitutional unless the person who challenges its constitutionality demonstrates its invalidity beyond a reasonable doubt. *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988) (citing *State v. Aver*, 109 Wn.2d 303, 306-07, 745 P.2d 479 (1987)). But a statute is not unconstitutional merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. *Eze*, 111 Wn.2d at 26-27 (impossible standards of specificity are not required).

Vick fails to prove former RCW 9A.44.130(7) is invalid beyond a reasonable doubt. The statute provides, "All offenders who are required to register . . . must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours." Former RCW 9A.44.130(7). The statute does not define "normal business hours." Vick argues that the statute is vague or ambiguous because it does not specifically state hours during which he is required to register. Further, Vick appears to argue that the circumstances for compliance are vague because there was no way for Vick to know that Detective Borden was in his office when Vick arrived late on September 16.

We hold that there is no requirement that former RCW 9A.44.130(7) list specific hours or that Vick should have been given special notice that Detective Borden was physically inside the building when he arrived late to register. First, it is reasonable for the Washington legislature to defer to each county sheriff's office to set its own "regular business hours" and there is no requirement that such hours reflect when a certain official is normally at an office rather than

when the office is open to the public. *See San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 709, 943 P.2d 341 (1997), *review denied*, 135 Wn.2d 1008 (1998). Second, Vick admitted he received a report on June 30, 2008, which showed his next register date to be September 16, and he knew he was required to "show up" between 8 am and 5 pm. Even assuming Vick had a flat tire as he was driving to the sheriff's office, *see* note 1, *supra*, Vick failed to contact Borden once he discovered his flat tire and knew there was a possibility of arriving late at the sheriff's office. Because Vick knew exactly the conduct required for him to remain in compliance with the statute and each county may, within reason, set its own "regular business hours," we hold that "regular business hours" is not so vague or ambiguous as to violate Vick's due process rights and void the statute. And because we hold that the statute is not ambiguous, we do not address or apply the rule of lenity. *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005) (if a criminal statute is ambiguous, the rule of lenity requires the court to interpret the statute in favor of the defendant absent legislative intent to the contrary).

Exceptional Sentencing

Vick contends that the trial court erred under an apparent belief that it did not have authority to consider an exceptional sentence below the standard range under former RCW 9.94A.535(1) (2007). The record shows that the trial court did not express any such belief.

The record does not support Vick's contention that the trial court believed it was precluded by the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, from imposing an exceptional downward sentence. Vick points to the following statement by the trial court:

> I don't have a lot of discretion. I'm not allowed to ignore the statute and ignore the will of the Legislature, regardless of what I personally think about the changes that the Legislature made. And we're not even going to go into those [changes].

> . . . As a matter of law, by statute, there really aren't any of the factors that would justify me in going below the standard range as far as a sentence is concerned.

RP (June 10, 2009) at 7. But this statement addresses two different statutes. First, when the trial court stated it was "not allowed to ignore the statute," it was referring to former RCW 9A.44.130, the sex offender registration statute under which Vick was convicted. Second, the trial court discussed former RCW 9.94A.535 and found the facts of the case did not fit into any of the listed mitigating factors. Thus, Vick's argument that the trial court stated it was without discretion with respect to sentencing is not supported by the record.

The SRA provides,

> The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.
>
> . . . .
>
> (b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

Former RCW 9.94A.535(1).

An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review: (1) Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous. (2) Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law. (3) Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion. *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997) (citing former RCW 9.94A.210(4) (1981); *State v. Branch*, 129

Wn.2d 635, 645-46, 919 P.2d 1228 (1996); *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991)).

Evidence from the record supports the trial court's finding that the facts of the case did not fall within the mitigating factors in the statute. Former RCW 9.94A.535(1)(b) simply does not apply to the facts of this case. Former RCW 9.94A.535(1)(b) requires a "victim" to whom the defendant compensates or attempts to compensate for injury. The instant case involves no victim or attempt to compensate. Moreover, even accepting Vick's explanation for his untimely registration, as the trial court noted, Vick waited until just one hour prior to when he knew he was required to register to attempt to leave his home, did not contact Detective Borden to explain his failure to appear in person, and, ultimately, failed to appear in person on September 16, 2008, by 5 pm.

Accordingly, the evidence is sufficient as a matter of law to support the jury verdict finding Vick guilty of failing to register as a sex offender and the trial court did not abuse its discretion when it found none of the mitigating factors in former RCW 9.94A.535(1) applied to Vick's sentencing and imposed a sentence of 14 months incarceration, the low end of the sentencing range. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

WORSWICK, A.C.J.

HARTMAN, J.P.T.